Supreme Court, U.S.
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No. 98-987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KENNETH HELLER,

Petitioner,

vs.

JEANNETTE YANNITELLI, individually and ALBERT J. YANNITELLI, as Administrator of the Estate of Donato Yannitelli,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION FIRST DEPARTMENT

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Kenneth Heller, the Petitioner herein, respectfully submits this Brief in Reply to Respondents' Brief in Opposition.

OBJECTIONS TO RESPONDENTS' COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioner respectfully objects to the Questions Presented submitted by Respondents, inasmuch as they state or imply that: a) the issues raised by Petitioner were not raised and/or decided in the state Court; b) the "evidence" in this matter was not disputed, contested or simply "indisputable"; and c) New York State law does not require recusal where a Judge expresses that her pecuniary interests are threatened by an attorney and political enemy practicing before her.

As set forth in more detail below, all of the issues raised herein, as demonstrated by: a) the Decision rendered by acting Supreme Court Justice Beverly Cohen on August 16, 1996, b) the Memorandum Decision rendered by the New York Supreme Court, Appellate Division, First Department on February 17, 1998, and c) the numerous motions and supporting affidavits and affirmations submitted below, clearly show that the rights claimed by Petitioner, to wit, the excessiveness of the subject punitive forfeiture, the lack of due process and deprivation of a hearing and/or jury trial were raised and passed upon in the proceedings before the aforementioned New York State Courts.

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POINT I

PETITIONER'S ISSUES WERE SUFFICIENTLY RAISED, AND CLEARLY RULED UPON IN THE TRIAL COURT AND THE SUPREME COURT, APPELLATE DIVISION.

Respondents' claim that Petitioner failed to raise the rights and protections sought herein at the trial court and/or upon appellate review, is untenable.

First, the record clearly reveals that Petitioner did, in fact, raise his rights to a jury trial or hearing, as well as the requested recusal by Justice Cohen. *See, e.g.* (R. 1366, P.App. F; R. 19, 21; and R. 19, respectively)[1]. Moreover that Petitioner clearly raised the argument that the penalties inflicted upon him were excessive, is demonstrated in the Decision of the Appellate Division. *See* Memorandum Decision of the New York State Supreme Court, Appellate Division of February 17, 1998 (P.App. 2a)(stating "The penalty of forfeiture of the contingent legal fee was not excessive.")

That Petitioner did not utter the exact words that Respondents seemingly require, does not render Petitioner's timely and strenuous objections before the trial and appellate courts ineffectual.

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[1] Items designated as ("R.") refer to the Record on Appeal; items designated ("P.App.") refer to Petitioner's Appendix in his Petition for Writ of Certiorari.

To the contrary, all of his claims were made known to the trial court, and raised upon appeal, as noted in the decisions of both courts, which denied those rights.

It has long been settled that "no particular form of words is necessary to be sued [sic] in order that the federal question may be said to be involved . . ." *Dewey v. City of Des Moines*, 173 U.S. 193, 19 S.Ct. 379 (1899).

Furthermore, the record below shows that "a definite issue as to the possession of the right must [have been] distinctly deductible from the record, without an adverse decision of which the judgment could not have been rendered." *See* Capital Nat. Bank of Lincoln, Neb v. First Nat. Bank of Cadiz, Ohio, 172 U.S. 425, 19 S.Ct. 202 (1899).

In the instant case Petitioner clearly protested the denial of his rights now asserted before this Court. *See, e.g.* (P.App. 34a-38a, 42a-44a, R. 19, R. 21, R. 1356, 1366). Moreover, the decisions rendered by the trial Court and the Appellate Division clearly denied those rights.

In her decision of August 16, 1996, acting Supreme Court Justice Beverly Cohen clearly stated, in pertinent part:

> On March 7, 1996 Mr. Heller made an oral motion on the record for me to recuse myself. The motion was denied. (P.App. 11a).
>
> Mr. Heller moves . . . for a

> jury trial on the issue of his fee. (P.App. 12a).
>
> The motions by Mr. Heller for a hearing and to defer the motions to Justice Greenfield are denied. (P.App. 20a).

Clearly, Mr. Heller raised his specific due process rights to a hearing and/or jury trial before Justice Beverly Cohen. Moreover, inasmuch as Justice Cohen was bound by the federal constitution to recognize and respect Mr. Heller's due process rights, the Court's decision could not have been made without a necessary denial of those rights.

Even more telling is the decision of the Appellate Division, which states, in pertinent part:

> The court's denial of recusal was a proper exercise of discretion. (P.App. 1a.)
>
> The penalty of forfeiture was not excessive. (P.App. 2a)
>
> There were no material disputed factual issues requiring an evidentiary hearing. (P.App. 2a)

Again, not only did Petitioner raise his due process rights on appeal, but they were necessarily decided by the Appellate Division, which denied the specific rights claimed by Mr. Heller. Moreover, the Appellate Division expressly found that the "[t]he <u>penalty</u> of forfeiture was <u>not excessive</u> [emphasis added]."

Moreover, the decisions below do not purport to rest upon adequate, independent state grounds that would support such a denial of constitutional rights. Indeed, no state grounds would preempt the supremacy of Petitioner's federal constitutional rights.

Thus, Respondents' argument that this Court lacks jurisdiction over the issues raised by Petitioner unavailing.

POINT II

PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED, INASMUCH AS HE CLEARLY DISPUTED ALL OF THE MATERIAL FACTS RELIED UPON BELOW, AND RAISED SERIOUS ISSUES AS TO RESPONDENT'S CREDIBILITY.

Respondents' claims that Mr. Heller alleged violations of the Code of Professional Responsibility were "undisputed," are belied by the volumes of pages in the record, and scores of opposing affidavits submitted by Mr. Heller and Respondents below.[2]

Similarly, despite Respondents' reference to "substantial documentary evidence," Justice Beverly Cohen's decision fails to cite a single page or document in support of Mr. Heller's forfeiture. To the contrary, the accusatory affidavits submitted by Petitioner's client alone fueled Justice

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[2] *See, e.g.*, (P. App. 34a-44a), (P. App. 22a-28a) (listing all of the affidavits and affirmations submitted in this obviously disputed cases), Record on Appeal, generally.

Cohen's entire Decision. Worse yet, Justice Cohen recognized that most, if not all, of the accusations hurled by Mrs. Yannitelli were disputed by the Petitioner.[3]

Thus, Respondents' endorsement of a summary forfeiture of over $700,000 on such vigorously disputed issues cannot be tolerated. More importantly, Petitioner submitted ample evidence that Jeanette Yannitelli was a completely incredible witness. *See, e.g.* (P. App. 39a-40a); (R. 1425-1427, 1429-30, 1557-65)

In fact, Mrs. Yannitelli, in recanting vicious statements she made against Mr. Heller in an unrelated proceeding, prepared, signed and sent a written statement to Justice Bruce Wright (J.S.C.), stating:

> Mr. Heller is the victim of an emotional war.

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[3]Justice Cohen noted that Mrs. Yannitelli was a scorned lover, (P. App. 4a-5a); that their business relationship was "racked with recriminations and allegations of wrongdoing from both sides, *id.*, at 5a; that Mrs. Yannitelli submitted no proof whatsoever that she invested in any ventures with Mr. Heller, as she claimed, *id.*; that Mr. Heller countered Mrs. Yannitelli's claims about bogus promissory notes, *id.*; that "Mr. Heller claims Mrs. Yannitelli is a liar," *id.*, at 6a; that Mr. Heller made an application to be relieved as counsel, *id.*, at 9a; that Mr. Heller claimed he received the consent of his client's oldest son to place the monies in a Dean Witter account, where they would "yield a higher income," *id.*; that "Mr. Heller has projected the blame for the entire breakdown of his relationship with his client onto Mrs. Yannitelli," *id.*, at 16a.

> Jean Woodlock called me on four different occasions. I, in a jealous, menopausal, sometimes intoxicated rage, made statements that are not true. Statements that were without foundation, absolute lies.
>
> Regretfully,
> /s/ (R. 1184)

Moreover, Mrs. Yannitelli admitted to wrongfully fabricating the letterhead of her attorneys, Moses & Singer, LLP, for the purpose of sending letters out to six (6) different people. (R. 1185-86)

These blows to Mrs. Yannitelli's credibility were further buttressed by claims made by Mr. Heller, and others, that Mrs. Yannitelli stole various properties from them. *See e.g.*, (R. 1425-1427, 1429-30, 1557-65).

If anyone was entitled to a hearing, and accordingly, the right to confront and cross-examine the only material witness against him, it was clearly Mr. Heller. The denial of such basic rights clearly violated Mr. Heller's due process rights, a point immediately raised on his first appeal. (R. 19-21).

POINT III
THE CRIMINAL FORFEITURE IN THE INSTANT CASE CLEARLY VIOLATES THE EIGHTH AMENDMENT.

Respondents' characterization of the tremendous punitive sanctions imposed against Petitioner as "the failure of the

trial court to award him an additional fee," is, clearly erroneous. First, Justice Cohen clearly awarded Mr. Heller his fee of one-third of the settlement proceeds in the case. (P.App. 12a). Then, summarily, without regard to procedure, limits or restraint, found that Mr. Heller "by his conduct" forfeited his fee. (P.App. 12a). Under any analysis, the forfeiture was punitive, and thus, the protections of the Eighth Amendment were clearly applicable.

Respondents' egregious misreading of *United States v. Ursery* notwithstanding, the Eighth Amendment's "harm v. penalty" analysis clearly applies to a punitive forfeiture. 518 U.S. 267, 116 S.Ct. 2135 (1996). In fact, *Ursery* itself notes the difference, as did Petitioner, that this Court "distinguished civil penalties such as fines from civil forfeitures that are in rem." *Id.*, at 283, 116 S.Ct., at 2145; *see also, id.*, at 275, 116 S.Ct., at 2141 ("In reaching its conclusion the [*Various Items*] Court drew a sharp distinction between in rem civil forfeitures and in personam civil penalties such as fines . . .")(citing *Various Items of Personal Property v. United States*, 282 U.S. 577, 51 S.Ct. 282 (1931).

Ursery also notes the difference between punitive and remedial forfeitures, a distinction surely lost by Respondents' reading. *Id.* The remedial purpose noted by *Ursery* was that 21 U.S.C. §881(a)(6) "applies to 'proceeds' of illegal drug activity, it serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts."

Id., at 291, 116 S.Ct., at 2148-49.

Here, the severe and criminally punitive forfeiture which was imposed upon the Petitioner without a hearing or jury trial served no remedial purpose. Moreover, Mr. Heller did not profit from any illegal acts. Rather, Mr. Heller was entitled to his fee due to eighteen (18) years of difficult legal representation over which he had little choice as to whether to continue his representation.[4]

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[4]In 1992, Mr. Heller applied to Justice Greenfield to be relieved as counsel. (R. 1370-73) Mr. Heller made this request because his client refused to pay monies that he lent her so that she would not be pressured to settle this case for $200,000, and because his client stole promissory noted from his office, and also stole property belonging to Mr. Heller's other friends and clients. *Id.*

Justice Greenfield persuaded Mr. Heller to remain on as counsel, and Mr. Heller reluctantly did so, after monies were placed in escrow to secure the loans Mr. Heller made in good faith to his client. *Id.*; *see also* (R. 1420). Unfortunately, Mrs. Yannitelli, claiming that she was 'starving,' persuaded Mr. Heller to release the funds from escrow to her until they were all dissipated. (R. 1372-73). To date, Mr. Heller has not been paid back by Mrs. Yannitelli for any monies she owed him.

Mrs. Yannitelli was clearly aware of any conflict that existed between herself and Mr. Heller, inasmuch as she knew about Mr. Heller's claims against her in 1992. (R. 1372). Nevertheless, Mrs. Yannitelli clearly chose to waive any conflicts, and continue with Mr. Heller as her attorney, only later to use whatever disagreements she had with Mr. Heller against him to avoid paying his fees for services rendered.

Other instances cited by the Respondents are completely irrelevant, and are apparently offered by Respondents for improper purposes, rather than for the Court's consideration of the instant matter.

POINT IV

JUSTICE BEVERLY COHEN DEMONSTRATED CLEAR BIAS AGAINST THE PETITIONER, AS WELL AS SIGNIFICANT PECUNIARY INTEREST IN THE OUTCOME OF THE CASE.

Clearly, Justice Beverly Cohen demonstrated clear bias against the Petitioner, inasmuch as she refused to grant the Petitioner a hearing, while plainly stating in her decision that Mr. Heller disputed the accusations hurled upon him by his client. Even a cursory review of the Court's decision on August 16, 1996 reveals the bias of acting Justice Cohen.

Moreover, Justice Cohen knew that Mr. Heller, a powerful political protagonist, would support a candidate against her in her next election. What better way to disable your political enemy than to deprive him of over $700,000?

Clearly, Justice Cohen exhibited a direct and pecuniary interest in depriving Mr. Heller of his fees to weaken his ability to oppose her and possibly oust her from the bench in the upcoming election.

Mr. Heller has, beyond doubt, been an outspoken advocate in both the legal and

political fields. He does not deny his persistence as an advocate, nor his inability to walk away from any battle, to the enormous benefit of his clients. As a result of his forty (40) plus outspoken years in New York City's legal and political realms, Petitioner clearly has enemies in both. Being deprived of his fee in excess of $700,000, is an unfortunate situation resulting from this fact.

All attorneys who take and fund cases on a contingency basis due to the inabilities of their clients to pay the costs necessary to assert their rights are affected by this decision. When a client hurls accusations at her attorney, after all of the work is completed and the benefits have been received, and solely to deprive her attorney of the returns on his substantial investments of money and effort, a hearing to determine the veracity of such claims, at the very least, must be guaranteed by due process.

CONCLUSION

It is respectfully requested that this Petition for a Writ of Certiorari be granted and that this Court exercise its jurisdiction.

Respectfully submitted,

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